160 U.S. 231

TRANSCRIPT OF RECORD.

160-321

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 619.

GEORGE E. WHITTEN, APPELLANT,

vs.

CHARLES A. TOMLINSON, SHERIFF OF NEW HAVEN COUNTY, CONNECTICUT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED MAY 20, 1895.

(15,907.)

(15,907.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 619.

GEORGE E. WHITTEN, APPELLANT,

vs.

CHARLES A. TOMLINSON, SHERIFF OF NEW HAVEN COUNTY, CONNECTICUT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

INDEX.

	Original.	Print.
Caption	2	1
Petition of appeal	3	1
Allowance of appeal	7	3
Appeal bond	8	4
Citation	10	5
Return to appeal	11	5
Petition for writ of *habeas corpus*	12	6
Writ of *habeas corpus*	15	7
Recognizance	16	8
Sheriff's return to writ of *habeas corpus*	17	8
Motion to quash return	19	10
Opinion	20	10
Order denying motion to quash and discharging writ	25	13
Order admitting petitioner to bail	26	14
Bail bond	27	14
Assignment of errors	28	15
Amendment to appeal and additional assignment of error	29	15
Letter of Judge Townsend to William H. Baker, May 4, 1895	30	16
Clerk's certificate	31	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 5, 1895.

1 Certified and annexed by me this 11th day of May, 1895.

[Seal of Circuit Court, Connecticut.]

E. E. MARVIN, *Clerk.*

2 *Ex Parte* GEO. E. WHITTEN.

Application for Habeas Corpus.

Be it remembered that heretofore, to wit, on the 25th day of April, there was filed in this court a certain appeal and appeal bond, which, with the indorsements thereon, were in the words and figures following, to wit:

3 UNITED STATES OF AMERICA:

Supreme Court of the United States.

Appeal from the circuit court of the United States for the State of Connecticut, special term.

MARCH 26TH, 1895.

Ex Parte GEORGE E. WHITTEN, Petitioner.

Upon the twenty-sixth day of March, A. D. 1895, this petitioner filed his petition in the circuit court of the United States within the district of Connecticut, alleging that he was a citizen of Massachusetts; that he was then confined in the custody of the sheriff of the county of New Haven for a supposed criminal offence, to wit, for the crime of murder in the second degree; that he was not held in confinement by virtue of any final judgment or decree of any competent court of criminal jurisdiction, but was held without due process of law; that in January, A. D. 1895, and for a long time prior thereto he was a citizen of Massachusetts and was extradited from Massachusetts for said alleged crime in said January, 1895; that his imprisonment was illegal and the illegality thereof consisted in this: that in August and September, 1893, he was tried before the local court sitting within and for the county of New Haven, State of Connecticut, upon the charge of murder in the second degree, being the same alleged charge for which he was extradited, and was, after a full hearing thereof, discharged from said court; that thereafterwards he remained in the city of New Haven, State of Connecticut, for a long time, during at least two sessions of the grand jury, and then removed to Newton, in the Commonwealth of Massachusetts, some time early in the year 1894; that he was, while said citizen of Massachusetts, arrested and extradited from the State of Massachusetts upon a warrant issued by the governor of Massachusetts on demand and application of the governor
4 of Connecticut, alleging that an indictment had been found by the grand jury against him of murder within and for the county of New Haven, being the same charge on which he was tried as above; that he was taken to the city of New Haven by vir-

tue thereof; and said petition further alleging that no indictment was ever found against him by any grand jury sitting at any time within the State of Connecticut, nor no indictment as and for a true bill ever was presented by any grand jury in said State of Connecticut, and this he was ready to verify; that he was not at any time of his extradition as aforesaid a fugitive from justice from said State of Connecticut, and prayed for a writ of *habeas corpus*, to the end that he might be discharged from custody, &c.

The sheriff of said New Haven county, one Charles A. Tomlinson, to whom this writ of *habeas corpus* was directed, made return and assigned for answer as to the cause of detention and imprisonment in the New Haven county jail that on the twenty-sixth day of March, A. D. 1895, said George E. Whitten was brought and committed to the said jail by virtue of mittimus or warrant of commitment in the words and figures following, to wit:

"To the sheriff of New Haven county, his deputy, or any proper officer or indifferent person, Greeting:

Whereas Lucius B. Hinman, of New Haven, Connecticut, did, on the seventeenth day of January, 1895, enter into recognizance in the sum of five thousand dollars ($5,000) for the appearance of George E. Whitten, of the town of Newton, State of Massachusetts, before the superior court, to be holden at New Haven, within and for the county of New Haven, on the first Tuesday of January, 1895, and the said Lucius B. Hinman now believes that the said George E. Whitten intends to abscond, and having produced the evidence that he is surety as aforesaid for the said George E. Whitten and hath applied to me for mittimus and hath made oath before me that the state-
5 ments in his said application are true, these are therefore by the authority of the State of Connecticut to command you that you forthwith arrest the said George E. Whitten and him commit to jail of said New Haven, Connecticut, and the keeper of said jail is hereby ordered to receive the said George E. Whitten and him safely keep within said jail till he be discharged by due order of law. Hereof fail not, and due service and return make.

Dated at New Haven this twenty-sixth day of March, A. D. 1895.

JOHN S. FOWLER,
Justice of the Peace."

Thereafterwards is the return, dated March 26th, 1895, signed by one Brocket, deputy sheriff, that by virtue thereof he had arrested the body of the said Whitten and placed him in the custody of the keeper of the New Haven jail, signed Charles A. Tomlinson, sheriff of *the* New Haven county.

To this return the petitioner, on the twenty-eighth day of March, A. D. 1895, filed a motion to quash return:

First. Because it does not state any authority of any competent court or officer for the holding of this petitioner.

Second. Because there is no sufficient offence set out or charged against this petitioner, justifying the holding of him or his deten-

tion in conformity with any law or of the statutes in those cases made and provided.

Third. Because there is no sufficient truth of justification of the whole case returned.

Fourth. Because it is not addressed to any court or officer before whom*e* this proceeding is returnable, and contains no caption.

Fifth. Because there is no sufficient certificate attached, directed to this court, and the true cause of detention.

Sixth. Because the same does not justify the holding or detention of this petitioner in accordance and agreeable to law or
6 agreeably to the statutes of the United States or the several States.

The said circuit court of the United States for the district of Connecticut, on the twenty-eighth day of March, A. D. 1895, made final ruling and decreed that upon the face of the petition, without hearing any evidence to sustain the petition, the writ should be discharged, and that the motion to quash said return be denied; and it was afterwards so decreed and ordered.

Where*by* this petitioner appeals from the whole of said decree of said circuit court, and the petition, return, motion to quash, decree, writ, and all other papers forming a record of said cause may be sent to the Supreme Court of the United States without delay, together with this appeal, and moves that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said circuit court be reversed, and for such further order and decree to be made as will to the Supreme Court of the United States seem just and right. The petition for the writ of *habeas corpus*, the writ of *habeas corpus*, the return of the sheriff, the motion to quash, and the decree of the court are hereby made a part of this appeal.

GEORGE E. WHITTEN,
By his attorney, WILLIAM H. BAKER.

BOSTON, *April* 16, 1895.

I hereby certify that this day sent by registered mail a duly certified copy of the above to T. E. Doolittle, Esq., att'y for the State of Connecticut, in an envelope directed "T. E. Doolittle, Esq., State's attorney, court-house, New Haven, Conn." The required postage was prepaid, and the letter containing this appeal, by
7 copy, duly dropped in the post-office at Boston.

WILLIAM H. BAKER.

SUFFOLK, *ss.*:

BOSTON, *Apr.* 16, 1895.

Then personally appeared before me the above-named Wm. H. Baker and made oath that the above certificate be him subscribed was true.

CLEMENT G. MORGAN,
Justice of the Peace.

NEW HAVEN, *April* 25, 1895.

The foregoing appeal is allowed.

WM. K. TOWNSEND, *Judge.*

8 UNITED STATES OF AMERICA:

Supreme Court of the United States.

From circuit court of the United States within the district of Connecticut.

Judicial Court in the State of Connecticut, Special Term.

MARCH 26, 1895.

Ex Parte GEORGE E. WHITTEN, Petitioner.

Appeal Bond.

Know all men by these presents that we, George E. Whitten, of Newton, in the State of Massachusetts, as principal, and Lucius B. Hinman, of New Haven, in the State of Connecticut, as surety, are held and firmly bound to The United States in the sum of two hundred and fifty dollars ($250), to be paid to the United States; — which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly be these presents.

Sealed with our seals. Dated this twenty-eighth day of March, A. D. 1895.

Whereas the above-named George E. Whitten hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment in the above-entitled action by the circuit court of the United States within the State of Connecticut:

Now, therefore, the condition of this obligation is such that if the above-named George E. Whitten shall prosecute his said appeal to the Supreme Court of the United States and answer all costs if he shall fail to make good his plea, then this obligation shall be
9 void; otherwise to remain in full force and virtue.

GEORGE E. WHITTEN. [SEAL.]
LUCIUS B. HINMAN. [SEAL.]

Witness:
W. H. BAKER.
To G. E. W.

ALBERT D. PENNY.
To L. B. H.

NEW HAVEN, *April* 25, 1895.

The foregoing bond is approved.

WM. K. TOWNSEND, *Judge.*

And on the same day a citation was issued & thereafter served & returned, which, with the return of service thereon endorsed, was and is in the words and figures following, viz:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Tilton E. Doolittle, Esq., State's attorney within and for the county of New Haven, State of Connecticut, representing the State of Connecticut in the case of *Ex parte* George E. Whitten, and to the State of Connecticut, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, District of Columbia, on the fifteenth day of May next, pursuant to an appeal duly obtained from a decree of the circuit court of the United States within and for the district of Connecticut, before the Hon. William K. Townsend, judge, wherein George E. Whitten, of Newton, in the county of Middlesex and Commonwealth of Massachusetts, being the petitioner for a writ of *habeas corpus*, is appellant and you are appellee, to show cause, if any there be, why the said decree entered against the said appellant shall not be corrected and why speedy justice shall not be done to the petitioner in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and ninety-five.

WM. K. TOWNSEND,
One of the Judges of the Circuit Court.

11 UNITED STATES OF AMERICA, }
District of Connecticut, } *ss:*

I herebe certify that on the 26th day of April, 1895, I served the within citation by leaving a true and attested copy in the hands of the within-named Tilton E. Doolittle.

RICHARD C. MORRIS,
United States Marshal,
By WILLIAM B. CATLIN,
His Deputy.

Fees.

Travel	$0 12
Service	2 00
	$2 12
Endorsements	25
Copy	50
	$2 87

The return of the judges of the circuit court of the United States for the district of Connecticut to the foregoing appeal follows in these words, viz:

The petition, writ, return, motion to quash, proceedings and decree whereof motion is therein made follow in these words and figures, to wit:

Ex Parte GEO. E. WHITTEN.

Petition for Habeas Corpus.

Be it remembered that on the 26th day of March, A. D. 1895, there was filed in court a certain petition as follows, viz:

12 UNITED STATES OF AMERICA:

Circuit Court of the United States within the District of Connecticut.

To the Hon. William K. Townsend, justice of the circuit court of the United States:

The petition of George E. Whitten respectfully shows to your honor that he is now a prisoner confined in the custody of Charles A. Tomlinson, sheriff of the county of New Haven, in the county jail in the city of New Haven, in said county, for a supposed criminal offence, to wit, a crime of murder in the second degree.

Your petitioner also shows that such confinement is by virtue of a warrant, a copy whereof is in the possession of said sheriff, and your petitioner avers that to the best of his knowledge he is not committed or detained by virtue of any process of law known to the courts of the United States or the several States, but he is now detained in violation of the Constitution of the United States, in violation of the laws of the United States, and in violation of the constitution and laws of the State of Connecticut, and that he is not held in confinement by virtue of any final judgment or decree of any competent court or tribunal of criminal jurisdiction or by virtue of any process issued upon such judgment or decree, but is held without due process of law.

And your petitioner further says that at the time of his arrest and for a long time prior thereto he was a citizen of Massachusetts, and was extradited from Massachusetts for said alleged crime in January, 1895; and he says that he is advised by his counsel, William H. Baker, residing at Boston, and so believes, that his said imprisonment is illegal, and that said illegality consisted in this, to wit:

13 That in August and September, 1893, this petitioner was tried before the local court sitting within and for the county of New Haven, State of Connecticut, upon a charge of murder in the second degree, being the same alleged charge for which he was extradited, and was after a full hearing thereof discharged from said court.

That thereafterwards this petitioner remained in the city of New Haven, State of Connecticut, for a long time—during at least two sessions of the grand jury—and then removed to Newton, in the Commonwealth of Massachusetts, some time early in the year 1894.

That he was in January, 1895, while such citizen of Massachusetts, arrested and extradited from the State of Massachusetts upon a warrant issued by the governor of Massachusetts on demand and application of the governor of Connecticut, alleging that an indictment

had been found by the grand jury against him of murder within and for the county of New Haven, being the same charge on which he was tried as above. This petitioner was taken to the said city of New Haven by virtue thereof.

This petitioner avers that no indictment was ever found against him by any grand jury sitting at any time within the State of Connecticut, nor no indictment as and for a true bill ever was presented by any grand jury in said State of Connecticut against him, which he is ready to verify and prove, and any pretended indictment was found by mistake or misconception and was not their true verdict or finding.

Further, your petitioner says that he was not at the time of this extradition as aforesaid a fugitive from justice from said State of Connecticut.

Wherefore your petitioner prays a writ of *habeas corpus*, to the end that he may be discharged from custody and be allowed to
14 depart safely from out the State of Connecticut to the Commonwealth of Massachusetts without interference in any way by the State authorities of the State of Connecticut without reference to said charge made against him.

GEORGE E. WHITTEN.

New Haven, Mar. 26, 1895.

Personally appeared before me the above-named George Whitten and made oath that the above petition by him subscribed was true to the best of his knowledge and belief.

[SEAL.] LUCIUS B. HINMAN,
Notary Public.

And the same day upon hearing there issued a writ as follows:

15 (*Writ Showing Officer's Return.*)

[SEAL.] The President of the United States of America to Charles A. Tomlinson, sheriff of New Haven county, in the district of Connecticut, Greeting:

We command you that you have the body of George E. Whitten, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, before a special term of the circuit court of the United States for the district of Connecticut, to be held in the post-office building, in the city of New Haven, in said district, on the 27th day of March, A. D. 1895, at 5 o'clock in the afternoon, to do and receive what shall then and there be considered concerning said George E. Whitten; and have then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Hartford, in the district of Connecticut, this 27 day of March, 1895.

E. E. MARVIN, *Clerk.*

New Haven, March 27, 1895.

Let the above writ issue.

WM. K. TOWNSEND, *Judge.*

UNITED STATES OF AMERICA, }
District of Connecticut, } *ss:*

NEW HAVEN, *March 28th*, 1895.

Then and there I left a true and attested copy of this writ in the hands of Charles A. Tomlinion, sheriff of New Haven county, in the district of Connecticut.

RICHARD B. MORRIS,
U. S. Marshal,
By WILLIAM B. COTTIN, *His Deputy.*

16 *Fees.*

Travel to serve	06
Service	2 00
Travel to court	10
	$2 16
Release on bond	50
	$2 66

And on the day of the issuance of the foregoing writ the said George E. Whitten, having been brought into court by Chas. A. Tomlinson, Esqr., sheriff of New Haven county, made and entered into his recognizance for appearance therein as follows, viz:

NEW HAVEN, *Mch* 27, 1895.

Then and there personally appeared in open court Geo. E. Whitten, principal, and Lucius B. Hinman, of New Haven, surety, and jointly and severally recognized themselves bound and held unto the United States of America in the sum of $5,000 that the said Whitten shall appear before said court in the U. S. court-room, at New Haven, March 28, 1895, at 10 o'clock in the forenoon, then and thereafter to abide the order of the court herein.

E. E. MARVIN,
Clerk U. S. Circuit Court.

And on the 28th day of March, A. D. 1895, the said sheriff filed in court his formal return to said writ as follows:

17 (*Sheriff's Return.*)

STATE OF CONNECTICUT, }
New Haven County, } *ss:*

NEW HAVEN, *March 28th*, 1895.

In obedience to the writ of *habeas corpus* issued by the United States circuit court for the district of Connecticut and by virtue of the same I have taken the body of the within-named George E. Whitten from the jail in New Haven, in the county of New Haven, State of Connecticut, and brought him to this place, where I now have him, the said George E. Whitten, here in this court, and for

the cause of his detention and imprisonment in the New Haven county jail I assign and state that on the 26th day of March, 1895, said George E. Whitten was brought and committed to the said jail by virtue of a mittimus or warrant of commitment in the words and figures following, to wit:

To the sheriff of New Haven county, his deputy, or any proper officer or indifferent person, Greeting:

Whereas Lucius B. Hinman, of New Haven, Conn., did on the 17th day of January, 1895, enter into a recognizance in the sum of five thousand dollars for the appearance of George E. Whitten, of the town of Newton, State of Massachusetts, before the superior court, to be holden at New Haven, within and for the county of New Haven, on the first Tuesday of January, 1895, and the said Lucius B. Hinman now believes that said George E. Whitten intends to abscond, and having produced the evidence that he is surety as aforesaid for the said George E. Whitten and hath applied to me for a mittimus, and hath made oath before me that the statements in his said application are true:

These are, therefore, by authority of the State of Connecticut, to command you that you forthwith arrest the said George E. Whitten and him commit to the jail of said New Haven county; and the keeper of said jail is hereby ordered to receive the said George E. Whitten and him safely keep within said jail until he be discharged by due order of law.

Hereof fail not, but due service and return make.

Dated at New Haven this 26th day of March, A. D. 1895.

JOHN S. FOWLER,
Justice of the Peace.

STATE OF CONNECTICUT, } ss.:
County of New Haven, }

TOWN OF NEW HAVEN, *March* 26, 1895.

Then and there, by virtue hereof, I arrested the body of the within-named George E. Whitten, read this writ in his presence, and placed him in the custody of the keeper of the New Haven county jail.

Attest: LUZERNE A. BROCKETT,
Deputy Sheriff.

18 Which mittimus or warrant of commitment I have also in court. I therefore assign the premises aforesaid as the cause of the detention and imprisonment of the said George E. Whitten in the New Haven county jail.

CHAS. A. TOMLINSON,
Sheriff of said County and Keeper of said Jail.

And on the same day the attorney for the petitioner filed his motion to quash as follows:

19 (*Motion to Quash.*)

UNITED STATES OF AMERICA:

Circuit Court of the United States, Judicial Court in the State of Connecticut, Special Term.

MARCH 28, 1895.

Ex Parte GEO. E. WHITTEN, Petitioner.

Motion to quash and for discharge.

And now comes the petitioner in the above-entitled cause and moves to quash the return of the respondent and for his discharge for the following causes:

First. Because it does not state any authority of any competent court or officer for the holding of this petitioner.

Second. Because there is no sufficient offence set out or charged against this petitioner justifying the holding of him or his detention in conformity with any law or of the statutes in those cases made and provided.

Third. Because there is no sufficient truth of justification of the whole case returned.

Fourth. Because it is not addressed to any court or officer before whom this proceeding is returnable and contains no caption.

Fifth. Because there is no sufficient certificate attached directed to this court and the true cause of detention.

Sixth. Because the same does not justify the holding or detention of this petitioner in accordance — and agreeable to law or agreeably to the statutes of the United States or the several States.

GEORGE E. WHITTEN.

And, the parties being then & there fully heard upon said motion, the court orally denied said motion, and thereafter, on the 4th day of April, filed its formal opinion and order in that behalf as follows, viz:

20 (*Opinion.*)

United States Circuit Court, District of Connecticut.

Ex Parte GEORGE E. WHITTEN.

TOWNSEND, *District Judge:*

Petition for a writ of *habeas corpus*, alleging that the petitioner is a citizen of the State of Massachusetts and that he is now detained in Connecticut in violation of the Constitution and laws of the United States.

The writ was issued and the sheriff brought the petitioner into this court and made return as to the cause of his detention and imprisonment that he was committed to jail by virtue of a mitti-

mus, in the form provided for by statute, duly issued by a justice of the peace on the application of the bondsman, upon oath, that the petitioner intended to abscond. A hearing was had upon a motion to quash the return.

As counsel have asked for a speedy disposition of the case, I have confined myself herein to a brief statement of my conclusions.

The petitioner was arrested in Massachusetts and brought into this State under a warrant issued by the governor of Massachusetts upon the requisition of the governor of Connecticut, accompanied by a certified copy of the indictment charging the crime and an affidavit that the petitioner was a fugitive from justice.

It is claimed in support of the petition that the indictment was procured by mistake and that the prisoner was not in fact a
21 fugitive from justice. These claims are denied by the attorney for the State.

In view of the conclusions reached it is not necessary to pass upon these questions of fact. It may be assumed in the disposition of this motion that all the allegations in the petition are true.

Counsel for the petitioner claims that he can prove, in the first place, that the indictment is invalid or void by reason of some mistake on the part of the grand jury. But the effect of an inquiry into this question, assuming such evidence to be admissible and true, would be to call upon the Federal court to examine into the proceedings under which said indictment was obtained and to determine collaterally its sufficiency under the laws of this State.

It has been repeatedly decided by the Supreme Court of the United States in cases of this character that, while the Federal court may have the power in its discretion to issue writs of *habeas corpus* to State courts in cases of urgency and where it appears that the petitioner is restrained of his liberty in violation of his rights under the Constitution, the exercise of such power before the question has been raised or determined in the State court is one which ought not to be encouraged. As is said by Mr. Justice Brown, delivering the opinion of the Supreme Court in Cook *vs.* Hart, 146 U. S., 183, 195:

"The party charged waives no defect of jurisdiction by submitting to a trial of his case upon the merits, and we think that comity demands that the State courts, under whose process he is held and which are equally with the Federal courts charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. Should such rights be denied his remedy in the Federal court will remain unimpaired."

It is further claimed that the petitioner was not a fugitive
22 from justice, and that inasmuch as extradition proceedings are based upon the statutes of the United States the question whether he was in fact such fugitive is a Federal question which it is the duty of this court to decide. But it is not denied that the demand made upon the executive authority of the asylum state and his action thereon were proper in form, and it will not be assumed in advance that he has surrendered the petitioner upon insufficient evidence.

In *Ex parte* Reggel, 114 U. S., 642, the prisoner was arrested under authority of a warrant of the governor of Utah upon a requisition from the governor of Pennsylvania, representing that the accused was a fugitive from justice. He applied for a writ of *habeas corpus* on the ground that the evidence was insufficient to show that he was a fugitive from justice, and, the application being denied, he carried the case to the Supreme Court of the United States.

The court, in its opinion on that point, said as follows:

"If the determination of that fact by the governor of Utah upon evidence introduced before him is subject to judicial review upon *habeas corpus*, the accused in custody under his warrant which recites the demand of the governor of Pennsylvania, accompanied by an authentic indictment charging him substantially in the language of her statute with a specific crime committed within her limits, should not be discharged merely because, in the judgment of the court, the evidence as to his being a fugitive from justice was not as full as might properly have been required, or because it was so meager as, perhaps, to admit of a conclusion different from that reached by him. In the present case the proof before the governor of Utah may be deemed sufficient to make a *prima facie* case against the appellant as a fugitive from justice within the meaning of the act of Congress."

I do not mean to be understood as denying the right to
23 this prisoner at an appropriate time to introduce evidence that he was not a fugitive from justice, or that the evidence before the governor of Massachusetts was insufficient to authorize his action, nor do I intend at this time to pass upon the merits of this or any other questions presented, *not* to intimate what disposition might be made of these claims in case they were brought before this court after final action in the State court. All that is now decided is that it must be assumed in advance that the petitioner may obtain all the protection to which he may be entitled in the courts of this State.

In State of New York *vs.* Eno, 155 U. S., 89, the Supreme Court of the United States held that the State court of original jurisdiction was competent to decide questions of this character in the first instance, and that its obligation to render such decision as would give full effect to the supreme law of the land and protect any rights secured by it to the accused was the same as that resting upon the courts of the United States. If the final judgment of the State court be adverse to this petitioner, he may then invoke the protection of the Federal court in case of any denial of his constitutional right.

In Robb *vs.* Connolly, 111 U. S., 624, the Supreme Court of the United States expressly decides that the States have the right by their own courts to enquire into the grounds upon which any person within their respective limits is restrained of his liberty and to discharge him from arrest if such restraint is illegal, even though such illegality arises from a violation of the Constitution or laws of the United States.

24 In view of the principle of right and law underlying the forbearance which the Federal and State courts exercise towards each other in order to avoid conflict I should not be justified in passing upon such questions in advance of the proceedings in the State courts.

In the brief time that has elapsed since the argument I have examined most of the cases cited by counsel for the petitioner in support of his claims. They show that whenever a Federal court has enquired into the constitution of a grand jury or the validity of indictments found by it, the original case either arose in a Federal court, or, as in Farley, *ex parte*, 40 Fed., 66, the petition for the writ was brought after trial in the State court.

The conclusions announced are confirmed by the very recent decision of the Supreme Court of the United States in Pearce *vs.* Texas, which I have examined since the argument. In that case the asylum State refused to enquire into the sufficiency of the indictment, but left those questions to be determined by the demanding State. The Supreme Court held that such refusal did not deny to the petitioner any constitutional right.

The motion to quash the return is denied without prejudice to the petitioner to hereafter renew his petition to this court, provided the circumstances render it proper to do so.

25 (*Decree and Order Discharging Prisoner.*)

At a special term of the United States circuit court for the district of Connecticut, held in New Haven on March 28, 1895.

Present: Hon. William K. Townsend, district judge.

In the Matter of the Petition of GEORGE E. WHITTEN in Court upon *Habeas Corpus.*

Upon reading and filing the motion of William H. Baker, Esquire, attorney for the petitioner, George E. Whitten, to quash the return of Charles A. Tomlinson, sheriff of New Haven county, to the writ of *habeas corpus* herein:

Now, the parties having been fully heard and due deliberation having been had, it is ordered the said motion be, and the same is hereby, denied, and that the writ be discharged without prejudice to the right of the petitioner to renew said motion, and it is further ordered, good cause having been shown therefor, that the accused, the said George E. Whitten, be detained in the custody of this court until its further order herein.

WM. K. TOWNSEND, *Judge.*

WM. H. BAKER,
For Petitioner.

26 And in said court, on the 25th day of April, A. D. 1895, upon the allowance of the appeal hereinbefore set forth, Edward H. Rogers, appearing for the attorney for the State for New Haven county, moved the court that the petitioner, pending the

appeal, be remanded to the custody of the respondent; which motion was then & there denied by the court.

And thereupon the petitioner, by Wm. H. Baker, his attorney, moved the court that the petitioner be admitted to bail; and thereupon, after hearing, the court granted the motion and admitted the petitioner to bail in the sum of $10,000; and thereupon the accused and his surety appeared and executed a bail bond in said sum as follows:

27 *In Re* the Application of GEORGE E. WHITTEN for a Writ of *Habeas Corpus.*

UNITED STATES OF AMERICA, }
District of Connecticut, City of New Haven, } *ss:*

Be it remembered that on the 25th day of April, 1895, before me, Edwin E. Marvin, clerk of the circuit court of the United States for the said district of Connecticut, personally came George E. Whitten, of Newton, in the State of Massachusetts, & Lucius B. Hinman, of New Haven, in the State of Connecticut, & jointly & severally acknowledged themselves to owe the United States of America the sum of ten thousand dollars, to be levied on their goods & chattels, lands & tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that whereas the said George E. Whitten has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment, decree, and order of the circuit court of the United States for the district of Connecticut, entered on the 4th day of April, 1895, in the above-entitled proceeding, dismissing & discharging the writ of *habeas corpus* thereon issued at & upon the application of the said George E. Whitten, directed to Charles A. Tomlinson, sheriff of the county of New Haven, in the State of Connecticut:

Now, therefore, if the said George E. Whitten shall personally appear before the circuit court of the United States in & for the district of Connecticut aforesaid, & then & there abide the further order, decree, & judgment of the said circuit court of the United States for the district of Connecticut & of the said Supreme Court of the United States upon appeal, & not depart from said district without the consent of said circuit court, then this recognizance to be void; otherwise to remain in full force & virtue.

GEORGE E. WHITTEN. [SEAL.]
LUCIUS B. HINMAN. [SEAL.]

Taken & acknowledged before me on the day & year first above written.

E. E. MARVIN,
Clerk of the Circuit Court of the United States for the District of Connecticut.

28 And on the 3rd day of May, 1895, the petitioner, by his attorney, filed in — the following assignment of errors:

UNITED STATES OF AMERICA:

Circuit Court of the United States within the District of Connecticut, Special Term, March 28, 1895.

Ex Parte GEORGE E. WHITTEN.

Assignment of Errors on Appeal.

And now comes the above petitioner, and, to the ruling and decree of said circuit court in the above cause, assigns the following errors on appeal:

1st. Because said court, assuming the facts in the petition to be true for the purpose of the hearing, erred in ruling that the writ of *habeas corpus* should be discharged.

2nd. Because said court erred in ruling that the motion to quash the sheriff's return should be denied.

3rd. Because upon the whole record of said cause the petitioner ought to be discharged from custody.

4th. Because the facts set out in the petition show the petitioner to be wrongfully detained.

5th. Because there is no sufficient justification for detention set out in the sheriff's return.

6th. Because said court erred in assuming that there was any prosecution going on against this petitioner in the State courts.

7th. Because said court erred in assuming that the petitioner should exhaust his remedy in the State courts.

8th. Because upon all the rulings in the cause the said court erred.

GEORGE E. WHITTEN,
By his attorney, W. H. BAKER.

29 And on the 8th day of May, 1895, the appellant filed the following amendm-t to his appeal and additional assignment of error, together with the accompanying statement of the district judge:

Circuit Court of the United States within the District of Connecticut.

Ex Parte GEORGE E. WHITTEN.

And now comes the petitioner in the above cause and amends his appeal as it now stands on the 4th page thereof, on the 21st line, between the word "petition" and "the," and insert therein in addition the following: "And denying the petitioner the right to introduce any evidence to sustain said petition or tending to sustain it, which the plaintiff duly offered," so that said clause in said appeal may read as follows: The said circuit court of the United States for the district of Connecticut, on the twenty-eighth day of March, A. D. 1895, made final ruling and decreed that upon the face of the petition, without hearing any evidence to sustain the petition, and denying the petitioner the right to introduce any evidence to sus-

tain said petition or tending to sustain it which the plaintiff duly offered, the writ should be discharged, and that the motion to quash said return be denied, and it was afterwards so decreed and ordered."

In consequence of the above insertion the petitioner now adds another assignment of error on appeal as follows:

"Ninth. Because the court erred in denying the petitioner the right to put in evidence tending to prove the allegations in the petition which the petitioner duly offered."

W. H. BAKER,
Att'y for Petitioner.

30 United States courts, judges' chambers.

NEW HAVEN, *May 4th*, 1895.

William H. Baker, Esq., 39 Court street, Boston, Mass.

DEAR SIR: Continuous court engagements night and day for 10 days have prevented an earlier reply to your letter of April 29th.

I had supposed that the record contained a statement of the fact that the court declined to hear the evidence; and, if not, I am willing that the statement of said fact should be inserted in the record, provided it can be properly done at this time.

Yours truly, WM. K. TOWNSEND.

31 DISTRICT OF CONNECTICUT, *ss:*

I, E. E. Marvin, clerk of the circuit court of the United States for said district, do certify that the foregoing is a true copy of the original petition, writ, return, motion to quash, proceedings, and decree of record and on file in my office in the matter of the *ex parte* petition of George E. Whitten, applicant for a writ of *habeas corpus*.

Seal of Circuit Court, Connecticut. Certified under my hand and the seal of said court, at Hartford, in said district, this 11th day of May, A. D. 1895.

E. E. MARVIN, *Clerk.*

Endorsed on cover: Case No. 15,907. Connecticut C. C. U. S. Term No., 619. George E. Whitten, appellant, *vs.* Charles A. Tomlinson, sheriff of New Haven county, Connecticut. Filed May 20th, 1895.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1895.

GEORGE E. WHITTEN, *Appellant*,

vs.

CHARLES A. TOMLINSON,
Sheriff of New Haven County, Connecticut, Appellee.

No. 619.

Appeal from the Circuit Court of the United States for the District of Connecticut.

AFFIDAVIT OF SERVICE OF MOTION.

STATE OF CONNECTICUT,
CITY AND COUNTY OF NEW HAVEN } ss.

EDWARD H. ROGERS, being duly sworn, deposes and says, that on the 3d day of October, 1895, he served a copy of the annexed motion and notice of motion, upon William H. Baker, Esquire, the attorney and counsel of

the said George E. Whitten, appellant, by depositing a copy of the foregoing motion and notice of motion in the Post Office at the City of New Haven in the State of Connecticut, postage prepaid, and registered, in a securely sealed envelope, addressed to said William H. Baker, Esquire, at No. 39 Court Street, Boston, Massachusetts, and on the 5th day of October, 1895, the deponent received from the said William H. Baker, a receipt for the same acknowledging that he had received the same on the 4th day of October, 1895, which receipt is hereto attached.

Edward A. Rogers

Subscribed and sworn to before me this 7th day of October, 1895.

Alfred W. Wheeler

Notary Public.

Office Supreme Court, U. S.
FILED.
OCT 21 1895
JAMES H. McKENNEY,
CLERK

No. 619.

In The Supreme Court of the United States.

For the October Term, 1895.

George E. Whitten, *Appellant*,

vs.

Charles A. Tomlinson, Sheriff of New Haven County, Conn., *Appellee*.

Appeal from the Circuit Court of the United States for the District of Connecticut.

Appellant's Answer to Appellee's Motion to Advance.

And now comes the appellant by his counsel and denies the correctness of so much of the allegations in the appellant's motion to advance as is herein specified.

First. He denies he was committed to jail by virtue of a mittimus duly issued by a justice of the peace.

SECOND. He denies that a certified copy of a joint indictment found against the petitioner and one Lee, of murder in the second degree, accompanied the requisition of the Governor of Connecticut.

THIRD. He denies that any indictment was ever found or pending, or is now pending against him in said State of Connecticut.

FOURTH. The fact that no indictment was ever found against him sufficiently denies the fact that an indictment was found against him by mistake.

FIFTH. The appellee says, "Public convenience and the cause of justice demand and require a speedy and immediate trial and determination of the indictment against the petitioner in the State of Connecticut."

Inasmuch as there is no indictment as hereinbefore set forth and no cause pending against the appellant in said State of Connecticut, this statement of the appellee is therefore incorrect.

SIXTH. The record of the cause in this court does not in the slightest degree justify the appellee in alleging the statements herein specially denied.

SEVENTH. This appellant denies that the State of Connecticut is a party to this proceeding, or that said State has any interest therein and denies the right of

the State's Attorney to appear in its behalf in this appeal.

EIGHTH. This appellant does not object to as speedy a hearing of this case as the court may think proper, but does ask that this court will give him ample time to prepare his brief and argument.

William H. Mitchell

WM. H. MITCHELL,

Of Counsel for Appellant.

See Ex Parte Tom Ping 108 Wis 555
In Re Fredrich 149 Wis 75

FILED
NOV 16 1895
JAMES H. MCKENNEY,
CLERK

APPELLANT'S BRIEF.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 619.

GEORGE E. WHITTEN, APPELLANT,

vs.

CHARLES A. TOMLINSON, SHERIFF OF NEW HAVEN COUNTY, CONNECTICUT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

WILLIAM H. BAKER,
Of Counsel for Appellant.

APPELLANT'S BRIEF.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 619.

GEORGE E. WHITTEN, APPELLANT,

vs.

CHARLES A. TOMLINSON, SHERIFF OF NEW HAVEN COUNTY, CONNECTICUT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

WILLIAM H. BAKER,

Of Counsel for Appellant.

STATEMENT OF CASE.

In January, 1895, Dr. Whitten, the appellant, who is a citizen of Massachusetts, was extradited from Massachusetts, and taken to the State of Connecticut on demand and application of the Governor of the State of Connecticut, alleging that an indictment for murder in the second degree had been found against this appellant, in the Courts of the latter State.

A short time after this, learning that no indictment in fact existed, or ever was presented or found against him in said State of Connecticut, and that no complaint of any description was lodged against him there, this appellant brought his petition for a writ of habeas corpus (page 6) in the Federal Court within the district of said State of Connecticut, against this appellee, Sheriff of New Haven County, Connecticut, and a citizen of Connecticut, alleging that no indictment existed or ever did exist against him therein, and that he was held without due process of law in violation of the Constitution and Laws of the United States, and of the Constitution and Laws of the State of Connecticut, and this appellant prayed for his release. The writ of habeas corpus accordingly issued.

The appellee returned, (page 8) as the true cause of detention, that he detained the appellant by virtue of a mittimus, a copy of which is set forth in the record, wherein it sets forth that a justice of the peace of New Haven County, State of Connecticut, on complaint of appellant's bondsman, orders George E. Whitten, of the town of Newton, Mass., to be arrested and committed to the jail of said New Haven County, and that the bail bond on which said bondsman became surety was a recognizance entered into by him on January 17, 1895, for the appearance of said George E. Whitten before the Superior Court of New Haven, on the first Tuesday of January, 1895.

The appellant moved to quash this return (page 10) for reasons assigned in said motion, but more especially because the mittimus set out in the return was absolutely void, and the return itself was fatally defective.

The learned judge overruled appellant's motion to quash the return.

Counsel for apellant then offered evidence tending to prove the allegations in the petition: (page 15) and more especially offered evidence to prove that no indictment existed, or ever did exist against him in the State of Connecticut. But the Court refused to hear such evidence and immediately denied the appellant the right to be further heard, (pages 15 and 16) and discharged the writ of habeas corpus, assuming in his opinion without the slightest justification, that a joint indictment was found by a Grand Jury, but at the same time for the purposes of this case, held that it might be assumed that all the petitioner alleged in his petition was true, (page 11) yet he had a discretion in the matter against hearing the case at that time.

From all of these rulings in manner, form and substance, this appellant appealed to this Court, and now submits his specification of errors and argument.

SPECIFICATION OF ERRORS.

1st. The decree of the Court was erroneous in overruling the appellant's motion to quash the appellee's return, because the return does not set forth any crime, offense, or a cause for detention; because the mittimus which is set out in said return does not show that the magistrate issuing it had jurisdiction, but does show that he was without jurisdiction to arrest a resident of Massachusetts: because, upon the face of said mittimus it is absolutely void, in that, the recogizance therein referred to is an obligation entered into upon a certain date, to perform some act before that date, which is an impossible undertaking (page 9).

2nd. The decree of the Court was erroneous in discharging the writ, in that—

(*a*) Because the mittimus shows appellant was held on void process.

(*b*) Because there was no indictment against appellant pending, or ever pending in the State of Connecticut (page 7).

(*c*) Because he was thereby and under color of the United States laws illegally extradited.

(*d*) Because he was thus held in violation of the Constitution and Laws of the State of Connecticut and United States.

(*e*) Because the Court ought to have heard the evidence and arguments.

(*f*) Because it should not have declined to hear the case in advance of the State Courts, as there was no process before such Courts, and because the parties are citizens of different States.

(*g*) Because the Court could not assume, without hearing evidence, that there was a proceeding against the appellant in the State Court.

(*h*) Because the whole record shows that this appellant was held without due process of law.

BRIEF OF ARGUMENT.

The first proposition to be considered is the motion to quash the sheriff's return. The said return (page 9) sets out a mittimus provided for in General Statutes of Connecticut. Sec. 962, which reads as follows: "Any bail or surety who has entered into a recognizance for the personal appearance of another, and shall afterwards believe that his principal intends to abscond, may apply to a justice of the peace in the county in which such principal resides, produce his bail bond, or evidence of his being bail or surety, and verify the reason of his application by oath or otherwise, and thereupon such justice shall forthwith grant a mittimus, directed to a proper officer or indifferent person of such county, commanding him forthwith to arrest such principal, and commit him to the jail of such county; and the keeper of such jail shall receive such principal, and retain him in jail until discharged by due order of law; and such surrender of the principal shall be a full discharge of the surety upon his bond or recognizance." The only jurisdiction then that the justice of the peace of New Haven County had under this statute, was to command the arrest of a person residing within this county and no other, much less could he order the arrest of one residing in Massachusetts: his jurisdiction was wholly by statute and must be strictly construed.

There is no presumption in favor of the jurisdiction of a justice of the peace, but it must be affirmatively shown by the record.

State v. Hartwell, 35 *Me.*, 129.
Hersoms Case, 39 *Me.*, 476.
Lane v. Crosby, 42 *Me.*, 327.
Manufacturing Co. v. Goodman, 43 *Me.*, 431.

Rossiter v. Peck, 3 *Gray*, 538.
Gurney v. Tufts, 37 *Me.*, 130.
Vinton v. Weaver, 41 *Me.*, 430.

It therefore appearing on the face of said mittimus (page 9) that Dr. Whitten was of the town of Newton, Massachusetts, and no allegation that he was even temporarily residing in New Haven, his arrest and imprisonment thereunder was absolutely void.

The mittimus contained in said return was absolutely void, for another reason: It is quite clear that if the original recognizance, upon which the bondsman surrendered Dr. Whitten, as claimed, is void, the magistrate or justice would have no authority to issue the mittimus or cause the arrest.

Such recognizance provides (page 9) "Whereas Lucius B. Hinman, of New Haven, Conn., did on the 17th day of January, 1895, enter into a recognizance in the sum of five thousand dollars for the appearance of George E. Whitten, of the town of Newton, State of Massachusetts, before the Superior Court, to be holden at New Haven, within and for the County of New Haven, on the first Tuesday of January, 1895," etc.

It will be seen that this is an undertaking on the 17th day of January, 1895, to perform something on the first Tuesday of January of the same year, which is an impossible contract and absolutely void, because there is no possible day certain fixed for performance. It needs no further argument to demonstrate such an absurd undertaking. I cite the following cases as bearing directly or indirectly on this point: —

State v. Sullivan, 3 *Yerg Tenn.*, 281.
Com. v. Bolton, 1 *S. & R.* (*Pa.*), 328.
Butler v. State, 12 *Smed & M.* (*Miss.*), 470.
Thurston v. Commonwealth, 3 *Dana*, *Ky.*, 225.
Wegner v. State, 28 *Texas Court of Appeals*, 419.
State v. Casey, 27 *Texas*, 111.
Britt v. State, 24 *Texas*, 219.
State v. Allen, 33 *Ala.*, 422.
Henry v. Commonwealth, 4 *Bush* (*Ky.*), 427.
Tr. of Vt. v. Merrill, 14 *Vt.*, 64.

One deprived of his liberty on such or like process, is

deprived of it without due process of law, and the Federal Courts in such a case will grant relief.

In re Monroe, 46 *Fed. Rep.* 52.

A return to a writ of habeas corpus is bad if it does not show for what cause the prisoner is detained in custody.

Church on habeas corpus, 123.
Ex Parte Trader, 24 *Tex. App.*, 393.
Barkins' case, 3 *Cro Car*, 507.

This return is bad because it does not state the crime, the place of commission, the time and person upon whom committed. It should so state the facts as to apprise the opposite party of what was intended to be proved.

State ex rel Neider v. Reuff, 29 *W. Va.*, 751.
Hurd on habeas corpus, 255–257.
Sonden's case, 4 *Barn. & Ald.*, 294.
Doo Woon, 18 *Fed. Rep.*, 898.

And the mittimus should state with certainty for what offense the commitment is made in order for the Court to determine if it be lawful

2 *Hale P. C.*, 122.
2 *Hawk. P. C., C.* 16, *Sec.* 16.
Ex Parte Burford, 3 *Cranch*, 448.
18 *Eng. Com. Law*, 279.
4 *Inst.*, 290.
5 *Mod.*, 159.
1 *Salk.*, 349.
State v. Everett, 1 *Dud.* (*S. C.*), 295.
Hurd on habeas corpus, page 256, 278 *of Ed.* 1858.

and a return showing an award to prison "and to remain there until further order" is uncertain.

3 *Cro Car*, 557. *See also*
In re Douglas, 3 *Ad & E. N. S.*, 825.

A return may be disputed in the petition by anticipation as well as by special traverse.

Seavery v. Seymour, 3 *Cliff.* 439–455.

The appellee justifies the detention by virtue of the mittimus and that alone, and upon this he must stand or fall. As above set forth, the mittimus was authorized by Section 962 of the General Statutes of Connecticut providing how sureties might in certain cases surrender their principals. But when such surety had surrendered his principal, the latter was, after such surrender, held and detained, not by virtue of the mittimus alone, but also under some original legal process which was the foundation of the recognizance, otherwise such recognizance would be void.

It logically follows, therefore, that such return affords this appellee no justification — Ex Parte Friday, 43 Fed. Rep. 916. Not only is it necessary to state everything essential to jurisdiction of the officer in the return at Common Law, but the Revised Statutes of United States, Sec. 757, provide that in all cases he shall state the true cause of detention.

The Federal Courts recognizing this wholesome principle of law have often discharged persons at once on habeas corpus when the return on its face was defective, without further considering the case.

Ex Parte Smith, 3 *McLeans*, 121, *U. S. Circuit.*
Doo Woon, 18 *Fed. Rep.*, 898.
Ex Parte Jenkins, 2 *Wall. Jr.*, 521.
Ex Parte Burford, 3 *Cranch* (*Supreme*), 447.
Ex Parte Friday, 43 *Fed. Rep.*, 916.

In which case Chief Justice Marshall said "We are unanimously of the opinion that the warrant of commitment was illegal for want of stating some good cause certain supported by oath."

See also Cuddy Pte., 131, *U. S.*, 283.

This appellant maintains, therefore, that he was entitled to his discharge on said return, at the time of making the motion

to quash, because of the reasons above set forth and because said return does not answer the petition. It being but a feeble effort to further conceal the true cause of detention.

The Constitution of the State of Connecticut provides, General Statutes of Connecticut, Art. 1, Section 9 — "He shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by due course of law, and no person shall be holden to answer for any crime, the punishment of which may be death or imprisonment for life, unless in a presentment or an indictment of a Grand Jury, except in the land or naval forces, etc.," and Section 1599, Gen. Sts. of Connecticut, provides among other things, "And no person shall be put to plead or held to trial for any crime, the punishment of which may be death or imprisonment for life, unless an indictment shall have been found against him for such crime by a Grand Jury legally impanelled and sworn, and no bill shall be presented by any Grand Jury, unless twelve at least of the jurors agree upon it." And Section 1401 provides among other things, "every person who shall commit murder in the second degree shall be imprisoned in the State's prison during his life, etc."

A writ of habeas corpus at Common Law and under the practice of the Federal Courts, is for inquiring into the cause of commitment, and the Statute of the United States, Section 761, provides how the Court shall do this.

The appellant alleged in his petition that no indictment was ever found against him in the State of Connecticut, also that he was extradited from Massachusetts on demand of the Governor of Connecticut alleging that an indictment was found against him in said State (pages 6 and 7).

We desire to say that the learned Circuit Court committed a serious error in assuming that any indictment was found against this appellant in said State. He had no right to deprive this appellant of the right to prove the allegations in his petition, and then substantially base his opinion upon the wrong assumption that such indictment existed. We must assume that the learned Court was mislead possibly from erroneous statements made by parties representing the appellee. But to show how serious his error was we find in his opinion (page 11) this, "In view of the conclusions reached it is not necessary to pass upon these questions of fact. It may be assumed that all the allega-

A return may be disputed in the petition by anticipation as well as by special traverse.

Seavery v. Seymour, 3 *Cliff*, 439–455.

The appellee justifies the detention by virtue of the mittimus and that alone, and upon this he must stand or fall. As above set forth, the mittimus was authorized by Section 962 of the General Statutes of Connecticut providing how sureties might in certain cases surrender their principals. But when such surety had surrendered his principal, the latter was, after such surrender, held and detained, not by virtue of the mittimus alone, but also under some original legal process which was the foundation of the recognizance, otherwise such recognizance would be void.

It logically follows, therefore, that such return affords this appellee no justification — Ex Parte Friday, 43 Fed. Rep. 916. Not only is it necessary to state everything essential to jurisdiction of the officer in the return at Common Law, but the Revised Statutes of United States, Sec. 757, provide that in all cases he shall state the true cause of detention.

The Federal Courts recognizing this wholesome principle of law have often discharged persons at once on habeas corpus when the return on its face was defective, without further considering the case.

Ex Parte Smith, 3 *McLeans*, 121, *U. S. Circuit.*
Doo Woon, 18 *Fed. Rep.*, 898.
Ex Parte Jenkins, 2 *Wall. Jr.*, 521.
Ex Parte Burford, 3 *Cranch* (*Supreme*), 447.
Ex Parte Friday, 43 *Fed. Rep.*, 916.

In which case Chief Justice Marshall said "We are unanimously of the opinion that the warrant of commitment was illegal for want of stating some good cause certain supported by oath."

See also Cuddy Pte., 131, *U. S.*, 283.

This appellant maintains, therefore, that he was entitled to his discharge on said return, at the time of making the motion

to quash, because of the reasons above set forth and because said return does not answer the petition. It being but a feeble effort to further conceal the true cause of detention.

The Constitution of the State of Connecticut provides, General Statutes of Connecticut, Art. 1, Section 9 — "He shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by due course of law, and no person shall be holden to answer for any crime, the punishment of which may be death or imprisonment for life, unless in a presentment or an indictment of a Grand Jury, except in the land or naval forces, etc.," and Section 1599, Gen. Sts. of Connecticut, provides among other things, "And no person shall be put to plead or held to trial for any crime, the punishment of which may be death or imprisonment for life, unless an indictment shall have been found against him for such crime by a Grand Jury legally impanelled and sworn, and no bill shall be presented by any Grand Jury, unless twelve at least of the jurors agree upon it." And Section 1401 provides among other things, "every person who shall commit murder in the second degree shall be imprisoned in the State's prison during his life, etc."

A writ of habeas corpus at Common Law and under the practice of the Federal Courts, is for inquiring into the cause of commitment, and the Statute of the United States, Section 761, provides how the Court shall do this.

The appellant alleged in his petition that no indictment was ever found against him in the State of Connecticut, also that he was extradited from Massachusetts on demand of the Governor of Connecticut alleging that an indictment was found against him in said State (pages 6 and 7).

We desire to say that the learned Circuit Court committed a serious error in assuming that any indictment was found against this appellant in said State. He had no right to deprive this appellant of the right to prove the allegations in his petition, and then substantially base his opinion upon the wrong assumption that such indictment existed. We must assume that the learned Court was mislead possibly from erroneous statements made by parties representing the appellee. But to show how serious his error was we find in his opinion (page 11) this, "In view of the conclusions reached it is not necessary to pass upon these questions of fact. It may be assumed that all the allega-

tions in the petition are true." The Court therefore practically decided that he can exercise his discretion against the release of one who is a citizen of another State, confined on a pretended charge of murder without indictment, after he had been extradited, until the matter had been heard by the State Courts within which he is confined, where no such indictment is alleged or set forth in the return.

After the writ of habeas corpus had once issued (page 7) and the prisoner was brought before the Court, it was then the duty of the Court under the Statute to proceed in a summary way to determine the facts by hearing the testimony and arguments, and then dispose of the party as law and justice require, that is, after the writ had issued he could not dispose of the party as law and justice require without determining the facts by hearing the testimony.

In re Neagle, 135 *United States*, 1.
Section 761, *United States Statutes*.

This was not done by the Circuit Court, as appears on page 13.

And all the proceedings can be revised on appeal.

Ex Parte McCardle, 6 *Wall*, 325.

We admit that there are cases where, although the person imprisoned might be held by the authority of a State in violation of the Constitution of the United States, yet he could not properly invoke the aid of the Federal Courts on habeas corpus in advance of his trial in such State Court, unless there are circumstances requiring immediate action.

Ex Parte Royall, 117 *U. S.*, 241.

All the cases decided by the Supreme Court of the United States affecting this question, have been cases where the prisoner was properly before such State Court on valid legal process duly issued, and it was not contended but the Court had jurisdiction over the person and possibly the offense. In this case we deny that the appellant is before any Court in the State of Connecticut, by virtue of any process whatsoever.

Mr. Justice Field said in Mahone *v.* Justice, 127 U. S., 700, "No mode is provided by which a person unlawfully abducted from one state to another can be restored from the state which he was taken if held on any process of law for offences against the state to which he has been carried. If not thus held, he can, like any other person wrongfully deprived of his liberty, obtain his release on habeas corpus (dissenting opinion)." The case of Ker *v.* Ill., 119 U. S., 436–440, establishes the same principle, and defines incidentally what due process of law means, in an able opinion written by Mr. Justice Miller, "The due process of law referred to in the 14th Amendment is complied with when the party is regularly indicted by the proper Grand Jury in the State Court, has a trial according to the forms and modes of such trials." "We do not pretend to say," said the learned judge, "that there may not be proceedings previous to the trial in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution, but for the mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say he should not be tried at all for the crime for which he is charged in a regular indictment."

These cases would seem to establish the proposition by clear inference, that where a person was not held to answer in a State Court on any process of law, he could be discharged in a Federal Court at once, also that the due process of law referred to in the 14th Amendment is not complied with when the person is not regularly indicted by the proper Grand Jury in the State Courts according to the forms and modes of such trials.

The learned judge in the latter case took the view that there might be proceedings in a State Court before trial in regard to which the prisoner could invoke the aid of this clause of the Constitution.

I submit this is one of those cases, not only giving this appellant the right to bring his petition in the Federal Courts, but one where no comity exists between the two tribunals. There being no indictment the State Court had no jurisdiction over the person or subject matter.

Ex Parte Baine, 121 *U. S.*, 1.
Ex Parte Farley, 40 *Fed. R.*, 66.
In re Buell, 3 *Dill.*, 116.

tions in the petition are true." The Court therefore practically decided that he can exercise his discretion against the release of one who is a citizen of another State, confined on a pretended charge of murder without indictment, after he had been extradited, until the matter had been heard by the State Courts within which he is confined, where no such indictment is alleged or set forth in the return.

After the writ of habeas corpus had once issued (page 7) and the prisoner was brought before the Court, it was then the duty of the Court under the Statute to proceed in a summary way to determine the facts by hearing the testimony and arguments, and then dispose of the party as law and justice require, that is, after the writ had issued he could not dispose of the party as law and justice require without determining the facts by hearing the testimony.

In re Neagle, 135 *United States*, 1.
Section 761, *United States Statutes*.

This was not done by the Circuit Court, as appears on page 13.

And all the proceedings can be revised on appeal.

Ex Parte McCardle, 6 *Wall*, 325.

We admit that there are cases where, although the person imprisoned might be held by the authority of a State in violation of the Constitution of the United States, yet he could not properly invoke the aid of the Federal Courts on habeas corpus in advance of his trial in such State Court, unless there are circumstances requiring immediate action.

Ex Parte Royall, 117 *U. S.*, 241.

All the cases decided by the Supreme Court of the United States affecting this question, have been cases where the prisoner was properly before such State Court on valid legal process duly issued, and it was not contended but the Court had jurisdiction over the person and possibly the offense. In this case we deny that the appellant is before any Court in the State of Connecticut, by virtue of any process whatsoever.

Mr. Justice Field said in Mahone *v.* Justice, 127 U. S., 700, "No mode is provided by which a person unlawfully abducted from one state to another can be restored from the state which he was taken if held on any process of law for offences against the state to which he has been carried. If not thus held, he can, like any other person wrongfully deprived of his liberty, obtain his release on habeas corpus (dissenting opinion)." The case of Ker *v.* Ill., 119 U. S., 436–440, establishes the same principle, and defines incidentally what due process of law means, in an able opinion written by Mr. Justice Miller, "The due process of law referred to in the 14th Amendment is complied with when the party is regularly indicted by the proper Grand Jury in the State Court, has a trial according to the forms and modes of such trials." "We do not pretend to say," said the learned judge, "that there may not be proceedings previous to the trial in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution, but for the mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say he should not be tried at all for the crime for which he is charged in a regular indictment."

These cases would seem to establish the proposition by clear inference, that where a person was not held to answer in a State Court on any process of law, he could be discharged in a Federal Court at once, also that the due process of law referred to in the 14th Amendment is not complied with when the person is not regularly indicted by the proper Grand Jury in the State Courts according to the forms and modes of such trials.

The learned judge in the latter case took the view that there might be proceedings in a State Court before trial in regard to which the prisoner could invoke the aid of this clause of the Constitution.

I submit this is one of those cases, not only giving this appellant the right to bring his petition in the Federal Courts, but one where no comity exists between the two tribunals. There being no indictment the State Court had no jurisdiction over the person or subject matter.

Ex Parte Baine, 121 *U. S.*, 1.
Ex Parte Farley, 40 *Fed. R.*, 66.
In re Buell, 3 *Dill.* 116.

Such circumstances existing, "Upon the State Courts equally with the courts of the Union rests the obligation to guard, enforce and protect every right granted by the Constitution of the United States and laws made pursuant thereof."

Robb v. Connelly, 111 *U. S.*, 637.

The leading case on this point is Ex Parte Royall, 117 U. S., 241. Royall being regularly indicted in Virginia for selling coupons without a license, he brought his petition of habeas corpus in the Circuit Court of the United States before his trial in the State Court alleging that his detention was in violation of the National Constitution. Mr. Justice Harlan delivered an able opinion of the court, holding that the acts of Congress gave the Federal Tribunals jurisdiction to discharge Royall if he was held in violation of the Constitution, but that the Circuit Court had its discretion, whether it would discharge him in advance of his trial or put him to his writ of error to the highest court of the state. One of the reasons given was that the injunction contained in Section 761, R. S. United States, "to hear the case summarily and thereupon to dispose of the party as law and justice require," does not deprive the Court as to the time and method in which it will exercise the powers conferred upon it. The other reason was that there were no special circumstances of urgency requiring immediate action. But there was a valid existing indictment and no contention but that Royall was held on valid process; the Court of Virginia had sufficient jurisdiction of the person to pass upon the constitutionality of the law upon which he was being tried.

In ex parte Bridges, 2 Wood, 428, cited in the Royall case, Mr. Justice Bradley adverting to the argument that where a defendant had been regularly indicted in a State Court, his only remedy was to carry the judgment to the State Court of last resort and thence by writ of error to this Court, said, "This might be so if the proceeding in the State Court was merely erroneous, but where it is void for want of jurisdiction, habeas corpus will lie and may be issued by any judge having jurisdiction."

Ex Parte Lange, 18 *Wall*, 163.

I submit, therefore, that the rule deducted from all the cases cited is, that a Federal Court has no legal discretion, but must discharge the prisoner unless it appears he is held on some state process valid on its face.

Re Munroe, 46 *Fed. Rep.*, 52.
Hans Nielson, 131 *U. S.*, 182.
In re McDonald, 9 *Am. Law Reg.*, 661.

Mr. Justice Brewer held in Ex Parte Kieffer, 40 Fed. Rep., 400, that where a person had been prosecuted in a Police Court for violation of a meat inspection ordinance and in prison thereunder, his imprisonment being unconstitutional, the petitioner ought to be discharged at once, and not be obliged to wait to further prosecute his appeal, the right of appeal being an inadequate remedy by reason of delay.

Re Bein, 42 *Fed. Rep.*, 545.
In re Ah. Jow, 29 *Fed. Rep.*, 181.

But the case at Bar involves the authority of the General Government and this comes within one of the special cases of urgency alluded to in Ex Parte Royall (page 251).

Dr. Whitten was taken to the State of Connecticut by virtue of imposition and fraud practiced on the Governor of that State, by its prosecuting officers. The laws of the United States provided how and in what manner only could the Governor of Connecticut demand the fugitive, as his demand must be accompanied by a certified copy of an indictment found, and this must have actually been duly found, otherwise there was no authority to make the executive demand.

Ex Parte Pfitzer, 28 *Ind.*, 450.

And it appears from the petition and return that no such indictment existed. Such extradition proceedings, therefore, conducted as they were under the authority of the General Government and by color of its laws, but in violation of such laws, creates such a special case of urgency above referred to.

State v. Jackson, 36 *Fed. Rep.*, 258.

We now pass to the next question to be considered; *i. e.*, 14th Amendment, "No state shall deprive a person of his life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of its laws."

What is due process of law? It is the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. It is the right of trial according to the process and proceeding of the common law or its regular course of adminstration through courts of justice.

Dartmouth College v. Woodward, 4 *Wheat*, 581.
Ex Parte Grace, 12 *Iowa*, 208.
3 *Story on Const.*, 264, 661.
9th Ed. Kent, 1 *Vol.*, 621.

"What are the inalienable rights of citizens?" was set forth in the Declaration of Rights of the 1st. Constitutional Congress, in 1774.

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a Grand Jury, in cases of high offense, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty."

Jones v. Robbins, 8 *Gray*, 329.

In which case Chief Justice Shaw held that a statute which gave a single magistrate authority to try an offense punishable by imprisonment in the state's prison, without presentment by a Grand Jury, violates the Constitution of Massachusetts.

"When the spirit of liberty has fled and truth and justice are disregarded, private rights can easily be sacrificed under the forms of law."

2 *Kent*, 8.

Where is there a pretense that Dr. Whitten was held in the State of Connecticut by due process of law? Can it be contended that a Circuit Court of the United States has a legal

discretion in refusing to hear an application for a writ of habeas corpus when a person is deprived of his liberty without due process of law by a state or any of its officers? As was said by the Court in Ex Parte Jenkins, 2 Wall, Jr., 521, "Is a prisoner to be brought before them only that they may acknowledge their utter impotence to protect him, and have they no power to act when intermeddlers endeavor to abuse state process? What remedy then can this appellant pursue? It would indeed be an unjust discretion to oblige him to be put to his writ of error to the highest Court of the state, in order for him to prove that that very state held him at the time, without due process of law. Thus he might be kept in jail for years awaiting the determination by that Court, of his present cause of detention, when the Court had in fact no jurisdiction to determine it. An idle, foolish and impotent proceeding, and in conflict with the spirit of the Constitution and laws of this nation.

There is a great difierence between the case of a person held for trial in a Court under a due process of law, in order for the Court to determine, whether the law upon which he is being tried is constitutional, and the case of one held without due process of law by the same Court, for the purpose of determining the same question. In the one case the proceedings are regular, in the other, void

Heretofore we have been claiming that the jurisdiction of the Federal Courts was based upon the existence of a federal question and one involving the Constitution of the United States. Let us now consider a separate and distinct ground of jurisdiction upon which this appellant has the right to an immediate hearing and discharge in the Circuit Court of Connecticut on the petition and return.

A habeas corpus proceeding is a civil action between the petitioner and the person detaining him, for the purpose of inquiring into the cause of his commitment and detention.

Ex Parte Milligan, 4 *Wall.*, 2
In re Frederich, 149 *U. S.*, 75.
In re Tom Tong, 108 *U. S.*, 556.

Mr. Justice Field said in Smith *v.* Adams, 130 U. S., 173, "Whenever the claim or contention of a party takes such a form that a judicial power is capable of acting upon it, then it

has become a case or controversy. And this was affirmed in Interstate Commerce Commission *v.* Brunsin, 154 U. S., 475 and 478.

A habeas corpus proceeding is a suit within the meaning of that word as used in the judiciary act of 1789, s. 25.

Holmes v. Jennison, 14 *Peter*, 540.

And such a proceeding is "a controversy" within the meaning of the federal statutes giving the district and Circuit Courts jurisdiction on the ground of citizenship, where the parties are wholly citizens of different states.

King v. McLean Asylum, 64 *Fed. Rep.*, 331.

Dr. Whitten therefore, being a citizen of Massachusetts, had a right to invoke the Federal Courts in Connecticut by habeas corpus against the sheriff of New Haven County, even on the sole ground of citizenship, and try therefore in that proceeding every question that he might try had he brought such petition in the State Court of Connecticut, of original jurisdiction. Under such jurisdiction the Circuit Court of Connecticut could exercise no legal discretion, as to the time when application should be made for the writ, any more than it could refuse to entertain a suit on a promisory note, the validity of which depended upon the laws of Connecticut, or of the United States, on the ground that the State Court was just as competent to decide these questions as the Federal Courts, or that comity demanded that the State Courts should be appealed to first.

This being so we maintain that the appellant's imprisonment being in direct violation of the laws of Connecticut and of the United States. The Circuit Court had jurisdiction to determine this, and should not have exercised any discretion against hearing the case at the time.

It appears from the petition and return that these provisions were violated and thereby your appellant has been subjected to gross and infamous outrage. Such conduct to an American citizen should be rebuked by an immediate discharge from arrest.

WILLIAM H. BAKER,

Of Counsel for Appellant.

FILED.
NOV 12 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1895.

GEORGE A. WHITTEN,
Appellant,
vs.
CHARLES A. TOMLINSON,
Sheriff of New Haven County,
Connecticut,
Appellee.

No. 619.

BRIEF FOR APPELLEE.

TILTON E. DOOLITTLE,
State's Attorney for New Haven County,
Connecticut.

EDWARD H. ROGERS,
Of Counsel.

Tuttle, Morehouse & Taylor, Law Printers.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1895.

George A. Whitten, Appellant, *vs.* Charles A. Tomlinson, Sheriff of New Haven County, Connecticut, Appellee.	*No. 619.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This is an appeal from an order of the Circuit Court of the United States for the District of Connecticut, denying appellant's motion to quash the return of the respondent and appellee to a writ of *habeas corpus* which had been issued to the appellant upon his petition, directed to the respondent and

appellee, as sheriff of New Haven County, in the State of Connecticut, and discharging the writ.

The petition upon which the writ was issued alleged that the petitioner was a prisoner, confined in the custody of the appellee and respondent,

> "as sheriff of the county of New Haven, in the "county jail, in the city of New Haven in said "county, for a supposed criminal offense, to wit, "a crime of murder in the second degree;"

that

> "such confinement is by virtue of a warrant, a copy "whereof is in the possession of said sheriff;"

that his detention was in violation of the Constitution of the United States, the laws of the United States, and the Constitution and laws of the State of Connecticut; that he was not held by virtue of any final judgment or decree of any competent court or tribunal of criminal jurisdiction, or by virtue of any process issued upon said judgment or decree, but without due process of law;

> "that at the time of his arrest and for a long time "prior thereto he was a citizen of Massachusetts, and "was extradited from said Massachusetts for said "alleged crime in January, 1895;"

that the illegality of his imprisonment consisted in this, to wit:

> "that in August and September, 1893, this petitioner "was tried before the local court, sitting within and "for the county of New Haven, State of Connecticut, "upon a charge of murder in the second degree, "being the same alleged charge for which he was "extradited, and was after a full hearing thereof "discharged from said court;"

that thereafterwards he

"remained in the city of New Haven, State of Con-
"necticut, for a long time, during at least two sessions
"of the grand jury, and then removed to Newton in
"the commonwealth of Massachusetts, sometime early
"in the year 1894. That he was in January, 1895,
"while such citizen of Massachusetts, arrested and
"extradited from the State of Massachusetts upon a
"warrant issued by the Governor of Massachusetts,
"on demand and application of the Governor of
"Connecticut, alleging that an indictment had been
"found by the grand jury against him of murder
"within and for the county of New Haven, being
"the same charge upon which he was tried, as
"above;"

that he

"was taken to said city of New Haven by virtue
"thereof;"

that no indictment was ever found against him by any grand jury sitting at any time within the State of Connecticut,

"nor no indictment as and for a true bill ever was
"presented by any grand jury in the State of
"Connecticut,

and that

"any pretended indictment was found by mistake or
"misconception, and was not their true verdict or
"finding."

The petition concluded by alleging that at the time of this extradition he was not a fugitive from said State of Connecticut.

The Circuit Court, thereupon, upon hearing, issued the writ, in obedience to which the respondent and appellee brought the petitioner into court, and thereafter made a formal return to the same, assigning as the cause of detention and imprisonment that Whitten had been committed to jail by virtue of a

mittimus or warrant of commitment, issued by a justice of the peace for New Haven County, upon the sworn application of his surety, one Lucius B. Hinman, *and who is Whitten's surety and bail in this appeal*, stating that prior thereto said Hinman had entered into a recognizance in the sum of five thousand dollars for the appearance of said Whitten before the Superior Court for New Haven County on the first Tuesday of January, 1895; and that said Hinman believed that said Whitten intended to abscond.

The statutes of Connecticut, under which this mittimus was issued, are §§ **1613** and **962** of the General Statutes of Connecticut, Revision of 1887, (edition of 1888), and are as follows:

> **"Sec. 1613.** Any surety in a recognizance in "criminal proceedings, who believes that his princi- "pal intends to abscond, may have the same remedy, "and proceed and be discharged in the same manner, "as sureties upon bail bonds in civil actions."

> **"Sec. 962.** Any bail or surety who has entered "into a recognizance for the personal appearance of "another, and shall afterwards believe that his prin- "cipal intends to abscond, may apply to a justice of the "peace in the county in which such principal resides, "produce his bail bond, or evidence of his being bail "or surety, and verify the reason of his application "by oath or otherwise, and thereupon such justice "shall forthwith grant a mittimus, directed to a "proper officer or indifferent person of such county, "commanding him forthwith to arrest such principal, "and commit him to the jail of such county; and the "keeper of such jail shall receive such principal, and "retain him in jail until discharged by due order of "law; and such surrender of the principal shall be a "full discharge of the surety upon his bond or recog- "nizance."

The petitioner then moved to quash the return and for his discharge, for the following causes:

> "First: because it does not state any authority of "any competent court or officer for the holding of "this petitioner.
>
> "Second: because there is no sufficient offense set "out or charged against this petitioner justifying the "holding of him or his detention in conformity with "any law or of the statutes in those cases made and "provided.
>
> "Third: because there is no sufficient truth of jus- "tification of the whole case returned.
>
> "Fourth: because it is not addressed to any court "or officer before whom this proceeding is returnable "and contains no caption.
>
> "Fifth: because there is no sufficient certificate "attached directed to this court and the true cause of "detention.
>
> "Sixth: because the same does not justify the "holding or detention of this petitioner in accordance "and agreeable to law or agreeably to the statutes of "the United States or the several states."

The parties were then fully heard upon this motion, when the court orally denied the same. Subsequently it filed its formal opinion and order in that behalf, from which order this appeal was taken.

Subsequent to the allowance of the appeal and the filing of the assignment of errors on appeal, the appellant attempted to amend his appeal and assignment of errors. This proposed amendment of the appeal was not formally allowed, but the district judge informed appellant's counsel by letter, a copy of which is included in the transcript of record, that he was willing that the statement contained in the proposed amend-

ment should be inserted in the record, provided "*it can properly be done at this time.*"

There is no finding of facts, or bill of exceptions, or transcript of proofs and evidence.

I.

The only questions reviewable by this Court upon this appeal are such as are raised by the pleadings,—the petition, the return, and the motion to quash.

Although the opinion of the court below has been transmitted with the record, in accordance with Rule 8, § 2, of this Court, it is not any part of the record below. Nothing can be considered on this appeal that is not presented in some appropriate form by the record.

England *vs.* Gebhardt, 112 U. S., 502.

The claimed right of the petitioner to introduce evidence in support of his petition is not raised by the motion to quash the return; moreover, there is nothing in the record to properly show that it was denied by the Circuit Court, or that there was any ruling thereon.

The petition of appeal forms no part of the record upon which action is taken in this Court.

Leeper *vs.* Texas, 139 U. S., 462.

II.

It appears from the record that there is an indictment pending against the petitioner in the State of Connecticut.

The petitioner alleges that he was a prisoner in the custody of the respondent,

> "for a supposed criminal offense, to wit, a crime
> "of murder in the second degree;"

that he had been arrested and extradited from Massachusetts upon a warrant issued by the Governor of that State, on demand and application of the Governor of Connecticut, alleging that an indictment had been found by the grand jury in that State against him for murder, but that said indictment "was found by mistake or misconception." The application to the Governor of Connecticut, preceding the requisition upon the Governor of Massachusetts for the arrest of the accused, was necessarily accompanied by a properly attested copy of the record of the indictment against the accused referred to in the petition herein.

> "The Governor may appoint agents to demand and
> "receive, from the executive authority of another
> "State, any fugitive from justice, or person charged
> "with any high crime in this State; and any applica-
> "tion to the Governor for that purpose shall be sus-
> "tained by a properly attested copy of the record of
> "the proceedings against the accused person, with
> "affidavits of one or more of the principal witnesses."
>
> General Statutes of Connecticut, Revision of 1887, (Edition of 1888,) § **1671.**

Furthermore, § **5278** of the Revised Statutes of the United States required the requisition to be accompanied by a copy of the indictment found, certified as authentic by the Governor of the demanding State.

The Circuit Court was therefore bound to presume that the application and requisition were properly sustained by an authentic indictment.

Neither of these contentions relates to the jurisdiction of the state courts of Connecticut, and therefore could not, in any event, be inquired into by writ of *habeas corpus*.

In re Green, 134 U. S., 377.

But, furthermore, neither the alleged defectiveness of the indictment, or the alleged prior trial and "discharge" of Whitten by "a local court" in Connecticut, presents any Federal question. This court could not upon writ of error to the Supreme Court of Errors of Connecticut, after conviction, review a decision sustaining the indictment.

The decision of the state courts as to what is the law of the State is binding upon the Federal courts.

Andrews *vs.* Swartz, 156 U. S., 272.
Bergemann *vs.* Backer, 157 U. S., 655.
In re Duncan, *supra*.
In re Robertson, 156 U. S., 183.
McNulty *vs.* California, 149 U. S., 645, 648.
Leeper *vs.* Texas, *supra*, 462, 467.
Giozza *vs.* Tiernan, 148 U. S., 657, 661.

Much less can these questions now be raised by *habeas corpus*, prior to any trial in the state courts of Connecticut.

Authorities, *supra*.

VI.

It must be presumed that the Governor of the State of Massachusetts surrendered the petitioner upon sufficient evidence that he was a fugitive from justice.

The Circuit Court had the right to assume, as it did, that the proof before the Governor of Massachusetts was sufficient to make a *prima facie* case against the appellant as a fugitive from justice. Not only did the statutes of Connecticut (§ **1671**, *supra*), require the Governor of that State to have before him, when making the requisition,

"a properly attested copy of the record of the pro-
"ceedings against the accused,"

but furthermore, § **5278** of the Revised Statutes of the United States required the requisition to be accompanied by a copy of the indictment found, certified as authentic by the governor of the demanding State.

The reasonable inference is that the requisition was made in accordance with the federal statute, and that it was accompanied and sustained by the evidence required by the statutes.

Ex parte Reggel, 114 U. S., 642.

Whether the decision of the Governor of Massachusetts that Whitten was a fugitive from justice was final and was properly made was proper to be determined by the courts of that State.

Cook *vs.* Hart, *supra*, 183, 192, 193.

The question here is not the validity of the *arrest* in Massachusetts, but the legality of his *detention* in Connecticut.

Mahon *vs.* Justice, 127 U. S., 700.
Ker *vs.* Illinois, 119 U. S., 436.
Cook *vs.* Hart, *supra*.

VII.

The decree of the Circuit Court discharging the writ, and refusing the discharge of the petitioner should be affirmed, with directions to the Circuit Court to remand the petitioner to the custody of the proper authorities of the State of Connecticut.

TILTON E. DOOLITTLE,
State's Attorney for New Haven County, Connecticut.

EDWARD H. ROGERS,
of Counsel.

ment should be inserted in the record, provided "*it can properly be done at this time.*"

There is no finding of facts, or bill of exceptions, or transcript of proofs and evidence.

I.

The only questions reviewable by this Court upon this appeal are such as are raised by the pleadings,—the petition, the return, and the motion to quash.

Although the opinion of the court below has been transmitted with the record, in accordance with Rule 8, § 2, of this Court, it is not any part of the record below. Nothing can be considered on this appeal that is not presented in some appropriate form by the record.

England *ex.* Gebhardt, 112 U. S., 502.

The claimed right of the petitioner to introduce evidence in support of his petition is not raised by the motion to quash the return; moreover, there is nothing in the record to properly show that it was denied by the Circuit Court, or that there was any ruling thereon.

The petition of appeal forms no part of the record upon which action is taken in this Court.

Leeper *ex.* Texas, 139 U. S., 462.

II.

It appears from the record that there is an indictment pending against the petitioner in the State of Connecticut.

The petitioner alleges that he was a prisoner in the custody of the respondent,

> "for a supposed criminal offense, to wit, a crime
> "of murder in the second degree:"

that he had been arrested and extradited from Massachusetts upon a warrant issued by the Governor of that State, on demand and application of the Governor of Connecticut, alleging that an indictment had been found by the grand jury in that State against him for murder, but that said indictment "was found by mistake or misconception." The application to the Governor of Connecticut, preceding the requisition upon the Governor of Massachusetts for the arrest of the accused, was necessarily accompanied by a properly attested copy of the record of the indictment against the accused referred to in the petition herein.

> "The Governor may appoint agents to demand and
> "receive, from the executive authority of another
> "State, any fugitive from justice, or person charged
> "with any high crime in this State; and any applica-
> "tion to the Governor for that purpose shall be sus-
> "tained by a properly attested copy of the record of
> "the proceedings against the accused person, with
> "affidavits of one or more of the principal witnesses."
>
> General Statutes of Connecticut, Revision of 1887, (Edition of 1888,) § **1671.**

Furthermore, § **5278** of the Revised Statutes of the United States required the requisition to be accompanied by a copy of the indictment found, certified as authentic by the Governor of the demanding State.

The Circuit Court was therefore bound to presume that the application and requisition were properly sustained by an authentic indictment.

III.

The return of the respondent showed a legal and sufficient cause for the detention and imprisonment of the petitioner.

The jurisdiction of the justice of the peace who issued the mittimus upon which the petitioner was arrested and held, is not questioned. The sworn application of the surety upon which the mittimus was issued was based upon the fact that a proceeding was pending against Whitten in which he had been arrested and released on bail.

General Statutes of Connecticut, §§ **1613, 962,** *supra.*

IV.

The Circuit Court had no jurisdiction of the petition, in the absence of an averment that the petitioner had been denied protection in the State courts of Connecticut.

Whether or not the indictment was in violation of the Constitution of the United States, and accordingly insufficient, is a question which must first be determined by the courts of the demanding State; and the Circuit Court could not presume in advance that any of those rights would be denied him by the courts of that state.

Pearce *vs.* Texas, 155 U. S., 311.

The Circuit Court was not at liberty,

> "under the circumstances disclosed, to presume that
> "the decision of the state court would be otherwise
> "than as required by the fundamental law of the
> "land, or that it would disregard the settled princi-
> "ples of constitutional law announced by this Court."
>
> *Ex parte* Royall, 117 U. S., 241, 252.
>
> New York *vs.* Eno, 155 U. S., 89, 94.

The proper time to invoke the jurisdiction of the federal court is after the claim of the accused of immunity from prosecution in the state court has been passed upon by the highest court of the State adversely to him.

Cook vs. Hart, 146 U. S. 183.
Ex parte Royall, *supra*.

V.

Neither the alleged insufficiency or defectiveness of the indictment, or the alleged prior trial and "discharge" of Whitten for the same offense by a "local court" in Connecticut gave the Circuit Court jurisdiction.

Each of these questions could have been raised and determined by the trial court in Connecticut, and no reason can be suggested why the Supreme Court of Errors of that State could not review the judgment thereon.

The Circuit Court was therefore without jurisdiction.

Cook *vs.* Hart, *supra*.
In re Duncan, 139 U. S., 449.
In re Wood, 140 U. S., 278.
Ex parte Fonda, 117 U. S., 516.

It was not intended by Congress that the Circuit Courts should by writs of *habeas corpus* obstruct the ordinary administration of the criminal laws of the states through their tribunals.

In re Wood, *supra*, 289.

> "Under the writ of *habeas corpus*, this Court can "exercise no appellate jurisdiction over the proceed- "ings of the trial court or courts of the State, nor "review their conclusions of law or fact, and pro- "nounce them erroneous. The writ of *habeas corpus* "is not a proceeding for the correction of errors."
>
> *In re* Frederich, 149 U. S., 70, 75.

Neither of these contentions relates to the jurisdiction of the state courts of Connecticut, and therefore could not, in any event, be inquired into by writ of *habeas corpus*.

In re Green, 134 U. S., 377.

But, furthermore, neither the alleged defectiveness of the indictment, or the alleged prior trial and "discharge" of Whitten by "a local court" in Connecticut, presents any Federal question. This court could not upon writ of error to the Supreme Court of Errors of Connecticut, after conviction, review a decision sustaining the indictment.

The decision of the state courts as to what is the law of the State is binding upon the Federal courts.

Andrews *vs.* Swartz, 156 U. S., 272.
Bergemann *vs.* Backer, 157 U. S., 655.
In re Duncan, *supra*.
In re Robertson, 156 U. S., 183.
McNulty *vs.* California, 149 U. S., 645, 648.
Leeper *vs.* Texas, *supra*, 462, 467.
Giozza *vs.* Tiernan, 148 U. S., 657, 661.

Much less can these questions now be raised by *habeas corpus*, prior to any trial in the state courts of Connecticut.

Authorities, *supra*.

VI.

It must be presumed that the Governor of the State of Massachusetts surrendered the petitioner upon sufficient evidence that he was a fugitive from justice.

The Circuit Court had the right to assume, as it did, that the proof before the Governor of Massachusetts was sufficient to make a *prima facie* case against the appellant as a fugitive from justice. Not only did the statutes of Connecticut (§ **1671**, *supra*), require the Governor of that State to have before him, when making the requisition,

"a properly attested copy of the record of the pro-
"ceedings against the accused,"

but furthermore, § **5278** of the Revised Statutes of the United States required the requisition to be accompanied by a copy of the indictment found, certified as authentic by the governor of the demanding State.

The reasonable inference is that the requisition was made in accordance with the federal statute, and that it was accompanied and sustained by the evidence required by the statutes.

Ex parte Reggel, 114 U. S., 642.

Whether the decision of the Governor of Massachusetts that Whitten was a fugitive from justice was final and was properly made was proper to be determined by the courts of that State.

Cook *vs.* Hart, *supra*, 183, 192, 193.

The question here is not the validity of the *arrest* in Massachusetts, but the legality of his *detention* in Connecticut.

Mahon *vs.* Justice, 127 U. S., 700.
Ker *vs.* Illinois, 119 U. S., 436.
Cook *vs.* Hart, *supra*.

VII.

The decree of the Circuit Court discharging the writ, and refusing the discharge of the petitioner should be affirmed, with directions to the Circuit Court to remand the petitioner to the custody of the proper authorities of the State of Connecticut.

TILTON E. DOOLITTLE,
State's Attorney for New Haven County, Connecticut.

EDWARD H. ROGERS,
of Counsel.